Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

LIGHTNING OIL COMPANY LIMITED,

Petitioner,

v.

HESS ENERGY INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Civil Procedure; *Sua Sponte* Summary Judgment

Where in a contract case a preliminary ruling of the trial court as to defendant's affirmative defense of justifiable repudiation dispenses with the necessity of proof of materiality beyond evidence of plaintiff's breach of an express covenant prohibiting the delegation of duties, and defendant subsequently moves successfully for summary judgment on that limited basis, may the Circuit Court in reversing that judgment on the grounds that materiality in fact must be shown, sua sponte enter judgment for the non-moving party and thereby foreclose defendant from any opportunity to prove same or to litigate other of its unrelated defenses ?

(a) Fifth Amendment; Due Process

Does not the Circuit Court's disposition of the case under the circumstances described at (1) hereinabove violate the movant's right to procedural due process under the Fifth Amendment to the United States Constitution ?

(b) Seventh Amendment; Trial by Jury

Does not the Circuit Court's disposition of the case under the circumstances described at (1) hereinabove violate the movant's right to trial by jury under the Seventh Amendment to the United States Constitution ?

(2) Diversity; Duty to Ascertain State Law

May a Circuit Court in diversity reverse summary judgment on the grounds of an undecided question of state law without engaging in appropriate analysis and prediction as to how the highest court of the state would decide the issue?

(3) Abuse of Judicial Power

While certiorari does not ordinarily issue to review an alleged error in the application of state law in a diversity case, and courts of appeal are effectively courts of last resort, should not certiorari nevertheless issue where an extraordinary departure by a Panel of the Court of Appeals from otherwise universally recognized principles of contract law, coupled with other significant factors, suggests an intentional disregard of the rule of law and thereby an egregious abuse of judicial power?

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PETITION FOR WRIT OF CERTIORARI

Lightning Oil Company, Limited ("Lightning"), prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit and for review thereby of the final Order denying rehearing and rehearing en banc entered in this proceeding on February 20, 2002, in order to address important questions of Federal Law which have not been, but should be, settled by this Court.

◆

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit together with the opinions of the United States District Court for the Eastern District of Virginia are reprinted in Appendix A hereto ("App. A") at p. A-1 et seq..

◆

JURISDICTION

Petitioner seeks review of the Order of the United States Court of Appeals for the Third Circuit entered in these proceeding on January 18, 2002 (App. A-13), rehearing and rehearing en banc denied February 28, 2002 (App. A-12). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the Constitution of the United States provides in pertinent part:

> *In suits at common law... the right of trial by jury shall be preserved...*

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> *No person shall...be deprived of life, liberty, or property, without due process of law...*

Rule 56 of the Federal Rules of Civil Procedure (Summary Judgment) provides in pertinent part:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing.

The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

STATEMENT OF THE CASE

This is a diversity case in which the Petitioner, Lightning Oil Company, Ltd. ("Lightning") is an independent natural gas producer in western Pennsylvania. In November of 1999 Lightning entered into a fixed volume gas marketing agreement with a small Pittsburgh firm, Statoil Energy Services, Inc. ("Statoil") under which Lightning agreed to produce and deliver on credit to Statoil's transmission facilities in Pennsylvania 80,000 decatherms of natural gas each month through March of 2002. Statoil agreed to maintain facilities to receive the gas, to market same and pay a fixed price to Lightning within a fixed period of time after it had successfully sold the gas to third parties. The written agreement contained a provision expressly prohibiting the assignment by either party of any of these very substantial duty or obligation (the "anti-delegation clause").

In early 2000, the price of natural gas began to rise dramatically, thereby commensurately increasing the profitability to Statoil of the fixed price contracts it had with Lightning and other producers, and making it a desirable target for acquisition by larger energy trading companies. Unbeknownst to Lightning at the time, one of the largest of such companies, Amerada Hess Corporation ("Amerada Hess") purchased 100% of the outstanding stock of Statoil on March 31, 2000. Six days later, it changed Statoil's corporate name to Hess Energy, Inc. ("Hess").

In April, payments to Lightning for gas supplied under the contract began to come from Amerada Hess rather than Statoil. Shortly thereafter Lightning was informed by a May 25, 2000 communication from Amerada Hess that it would be administering the Statoil accounts and that thenceforth all communications should be had with Amerada Hess employees. The communication however said nothing about either the stock acquisition or the name change .

Lightning, believing this communication to evidence a violation of the anti-delegation clause, notified Statoil and Amerada Hess that it considered itself by such breach to be discharged from further obligations and would cease delivery of gas as of June 30, 2000. In response, Lightning received correspondence from Amerada Hess stating that no assignment had been made and that nothing had changed except that Statoil's stock had been acquired by Amerada Hess and that Statoil's name had been changed to Hess Energy, Inc. The correspondence did not however explain why Lightning had been directed to deal directly with, nor why payments were now coming from, Amerada Hess instead of Hess. When Lightning pressed for further information clarifying this, Amerada Hess refused.

Lightning accordingly ceased gas deliveries and Hess brought suit for breach of contract in the United States District Court for the Eastern District of Virginia.

In its answer to the complaint, Lightning denied liability and pleaded several independent and legally discrete affirmative defenses. Among others, it alleged that the breach of the express anti-delegation clause had, without more, discharged it from further obligation under the contract because a breach of such clause is a material breach as a matter of law; it alleged in the alternative that the breach of the anti-delegation clause was in any event a material breach in fact because Lightning had in fact a material interest in having the original party perform the contract; and it alleged that an express provision of the contract precluded the parties from suing for special, incidental or consequential damages.

Upon closure of the pleadings, and prior to any discovery, the parties filed cross motions for summary judgment, submitting in support affidavits and documents already in their respective possession. Hess moved for judgment on the basis that Lightning admitted its cessation of deliveries and that there had been no breach of the anti-

delegation clause by Hess. Lightning moved for judgment on the limited theory that the anti-delegation clause had been breached in fact and that it was without more entitled to discharge of further performance as a matter of law. Hess responded that even if there were a breach of the anti-delegation clause, such breach was not sufficiently material to give rise to anything but an action for damages.

In disposing of the motions the District Court rejected Hess's argument and ruled that unlike cases where the agreement is silent or only prohibits assignment of the "agreement," because the parties had themselves included in their contract an express prohibition against assignment of "duties," a breach of that covenant was material *per se* and proof of its breach would, without more, discharge Lightning from further performance. *Finding however that the record was ambiguous as to whether Hess had actually violated the anti-delegation covenant, it denied both motions.* (See Appx. A-22)

Thus armed with and relying upon the law of the case that proof of materiality beyond the fact of breach of an express anti-delegation clause was unnecessary, Lightning undertook discovery limited to whether the anti-delegation clause had been violated in fact. The depositions of Amerada Hess personnel then taken demonstrated that notwithstanding that Statoil was acquired via stock acquisition, it was never maintained as a separate operating subsidiary. But for the continuance of its paper existence under its new name "Hess," it ceased to exist in fact and its operations were wholly absorbed by Amareda Hess. Statoil's Pittsburgh offices were closed, its employees were transferred to and hired by Amareda Hess at its Alexandria facilities in Virginia, no offices were provided for it at that or any other facility, it had no operating personnel, its contracts were commingled with those of Amerada Hess, and all duties and obligations of Statoil *cum* Hess, including the making of

contract payments to the Statoil producers, were undertaken by Amerada Hess using its own employees and funds.

Drawing upon these discoveries Lightning filed a *Second* Motion for Summary Judgment. Finding that the resulting supplemented record warranted the conclusion that Hess had violated the anti-delegation clause, the District Court granted the motion by Opinion and Order of February 6, 2001 (Appx. A-14)

On appeal however, the Fourth Circuit Court of Appeals held that the District Court erred as a matter of law in ruling that a breach of an express prohibition of assignment of duties was *per se* a material breach warranting discharge. It however did so without the benefit of any controlling decision in the forum state of Virginia, and without engaging in any analysis and prediction as to how the Virginia Supreme Court would hold. Neither did it consult the law of Pennsylvania (where the contract was made and was entirely to be performed) or the law of any other states, the great weight of authority of which, including Pennsylvania, have decided the issue otherwise.

Further, in reversing summary judgment on the grounds that the limited record before it failed to demonstrate materiality in fact, the Circuit Court remanded with the instruction that the district court proceed to the assessment of Hess's damages, thus effectively directing judgment on liability for Hess, the non-moving party, and foreclosing Lightning from any opportunity to prove what it had no reason to prove prior to the Circuit Court's decision. In doing so moreover, the Circuit Court also foreclosed Lightning from litigating any of its other discrete defenses.

ARGUMENT

QUESTION 1- Sua Sponte Summary Judgment

Where in a contract case a preliminary ruling of the trial court as to defendant's affirmative defense of justifiable repudiation dispenses with the necessity of proof of materiality beyond evidence of plaintiff's breach of an express covenant prohibiting the delegation of duties, and defendant subsequently moves successfully for summary judgment on that limited basis, may the Circuit Court in reversing that judgment on the grounds that materiality in fact must be shown, sua sponte enter judgment for the non-moving party and thereby foreclose defendant from any opportunity to prove same or to litigate other of its unrelated defenses ?

The first issue presented has not been revisited by this Court since *Fountain v Filson*, 336 U.S. 681, 93 L Ed 971, 69 S. Ct. 754 (1949) and *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 78 S. Ct. 893, 2 L Ed 2d 953 (1958)

Fountain, supra, involved a suit in which the plaintiffs claimed a $6,000 interest in certain New Jersey realty, it being alleged that the defendants acquired title to this realty subject to a resulting trust in favor of the plaintiffs in that amount. The defendants denied the existence of a resulting trust and also denied the existence of any obligation to the plaintiffs. The

documents covering the transfer of the realty and certain depositions of the parties were filed. The defendant then moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The sole basis of the motion was a claim that New Jersey law would not permit the imposition of a resulting trust under the circumstances disclosed in the complaint and the accompanying documents. The motion was granted and judgment for defendant was entered. On appeal, the Court of Appeals, while agreeing that no resulting trust could arise, concluded that the summary judgment in defendant's favor was nevertheless erroneous because the complaint contained a general prayer for further relief and alleged facts on the basis of which a personal judgment for $6,000 could have been recovered even in the absence of a resulting trust in the realty. But instead of simply reversing and remanding, the Court of Appeals proceeded to examine the depositions which had been taken in advance of trial and concluded that they showed the existence of a personal obligation, and on that basis the case was remanded to the District Court with instructions to enter a personal judgment in favor of the plaintiffs for $6,000.

This Court reversed, observing that notwithstanding that the limited record before the Court of Appeals may have demonstrated no genuine issue of fact as to the defendant's liability, the Court of Appeals could not foreclose the defendant from presenting proofs on its *other* defenses where the only claim considered by that court on the motion for summary judgment was the claim that there was a resulting trust. It was held error for the Court of Appeals to *sua sponte* deprive the defendant of an opportunity to dispute the facts material to the plaintiff's claim by ordering summary judgment against him as a moving party who had framed the motion for the limited purpose of seeking judgment on the plaintiff resulting trust theory.

Byrd, supra, involved a plaintiff who was injured while engaged in work in connection with the construction of an electric company's substation, and who sought recovery in

negligence from the electric company in a diversity suit in the United States District Court for the Western District of South Carolina. The construction of the substation was done by plaintiff's employer pursuant to a contract with the electric company, and that company claimed the benefit of a South Carolina workmen's compensation statute which provides, in effect, that one who contracts with another for the performance of work which is "a part of his trade, business, or occupation" is the statutory employer of such other's employees, is liable to pay workmen's compensation to such employees, and is immune from negligence liability to such employees. The District Court granted plaintiff's motion to strike this defense. Following trial, the Court of Appeals for the Fourth Circuit reversed, viewing the South Carolina statute as contemplating, and the evidence submitted by the electric company as showing, that the work done by plaintiff's employer was a part of the electric company's trade, business, or occupation. The Court of Appeals directed the entry of judgment for the electric company.

On certiorari, this Court reversed holding (1) that the Court of Appeals should not have directed judgment for the electric company, but should have ordered a new trial to permit plaintiff to offer his own proof pertinent to a determination, according to the Court of Appeals' construction of the South Carolina statute, whether the work in connection with which plaintiff was injured was a part of the electric company's trade, business, or occupation; and (2) that, on the new trial, the question whether the electric company was entitled to the immunity accorded by the South Carolina statute was to be decided by the jury, notwithstanding South Carolina decisions holding this question to be one for the court.

Both *Byrd* and *Fountain* are implicated in the present case in that not only was the Lightning deprived of the opportunity to present evidence on it *other* defenses (*Fountain*), but was as well never afforded an opportunity to factually address what only upon appeal was found by the Court of

Appeals to have been the dispositive question (*Byrd*). As in *Byrd*, the Court of Appeals here actually changed the law of the case so as to require an additional element of proof which the trial court had, *prior* to the filing of the motion for summary judgment, held was unnecessary. And, as in *Fountain*, the Court of Appeals entered judgment against the moving party on the state of an incomplete record thus not only depriving that party of an opportunity to litigate the issue found to be dispositive, but *other* of its defenses as well.

The present case is an exemplar of the extent to which the teachings of *Fountain* and *Byrd* have fallen from memory in the Courts of Appeal, and how movants who properly invoke the distilling benefits of Rule 56 can find themselves overreached by the power of the court to enter judgment against the moving party *in a proper case*.

The use of Rule 56 as a device to test the viability of part, but not all of the legal claims and defenses of litigants prior to trial has grown coextensively with the proliferation of civil cases in federal courts since *Fountain* and *Byrd*. In the intervening 53 years since *Fountain*, and the 44 years since *Byrd*, this Court has had occasion to address and refine its view of the operation and use of Rule 56. See notably, *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S Ct 2548, 91 L Ed 2d 265 (1986). This Court has however not since *Fountain* and *Byrd* addressed the problem presented here nor the underlying Fifth and Seventh Amendment issues which it implicates (discussed *infra*).

This case presents an opportunity for the Court to issue a long overdue reminder that Rule 56 serves the dual purpose not only of disposing of *cases* where trial is unnecessary, but disposing of *issues* which need not be tried; and that where discrete issues are presented, courts must exercise great caution in not foreclosing a litigant from fairly litigating defenses which they had no fair opportunity to develop and present.

The Notes of the Advisory Committee on the 1946 Amendments to subsection (d)[1] of the Rule make clear that the latter use of the procedure is not only permitted but encouraged as a means to simplify the eventual trial process. It states in pertinent part as follows:

> *The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See Leonard v. Socony-Vacuum Oil Co., 130 F.2d 535 (7th Cir. 1942); Biggins v. Oltmer Iron Works, 154 F.2d 214 (7th Cir. 1946);*

In the present case there were two such pretrial adjudications by the District Court. In the first, (Appx. A-22), the Court eliminated the need for Lightning to prove materiality in fact at trial on the basis that a breach of an express covenant prohibiting the delegation of duties was material *per se*, and

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[1] Subsection (d) of Rule 56 provides as follows: *(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.*

without more would support Lightning's affirmative defense of justifiable repudiation if proved. Finding however that the record then before it was inconclusive as to plaintiff's breach, summary judgment was denied.

The second adjudication (Appx. A-14) followed the filing of a second motion for summary judgment which was submitted with additional proofs limited to the issue of Hess's wrongful delegation of duties. Convinced that the additional proofs eliminated any genuine issue of fact as to plaintiff's breach, the District Court sustained the second motion and awarded summary judgment to Lightning. It is from this adjudication that appeal was taken.

In not only reversing, but directing judgment for Hess as the non-moving party, the Court of Appeals failed to take into consideration that had the district court not ruled in its first adjudication that proof of materiality in fact was unnecessary, Lightning would have had the opportunity to conduct discovery and present proofs on that issue either at trial or in support of its second motion. It certainly preserved that right in the pleadings. In its answer to the complaint, Lightning denied liability on several independent and discrete grounds. Among them, while it alleged that the breach of the *express* anti-delegation clause had, without more, discharged it from further obligation under the contract as the District Court held; it also alleged in the alternative that the breach of the anti-delegation clause was a material breach in fact because the Lightning had a material interest in fact in having the original party perform the contract. But precisely because the District Court ruled it unnecessary to produce evidence of materiality in fact, Lightning never had the opportunity to develop that defense, nor any of the other unrelated affirmative defenses which it raised, including the defense that the contract terms bilaterally barred the recovery of consequential damages.

This was exactly the situation in *Byrd, supra,* as to which the Court observed:

> *...implicit in the direction of verdict* [against the moving party] *is the holding that the petitioner, although having no occasion to do so under the District Court's erroneous construction of the statute, was not entitled to an opportunity to meet the respondent's case under the correct interpretation. That holding is also implied in the court's denial, without opinion, of petitioner's motion for a rehearing sought on the ground that ". . . The direction to enter judgment for the defendant instead of a direction to grant a new trial denies plaintiff his right to introduce evidence in contradiction to that of the defendant on the issue of defendant's affirmative defense, a* ***right which he would have exercised if the District Judge had ruled adversely to him on his motion to dismiss, and thus deprives him of his constitutional right to a jury trial on a factual issue.***" [counsel's emphasis]

Id., 2 L Ed 2d at 958-59

It is noteworthy that the inclusion in its answer of both defenses (materiality *per se* and materiality in fact) were meant to prophylactically invoke both prongs of the legal dichotomy resident in both the Uniform Commercial Code and the Restatement (Second) of Contracts, each of which intimate that without more, an express prohibition against delegation of duties will be enforced, whereas materiality in fact must be proved if the contract is silent or ambiguous.[2]

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[2] Section 2-210 of the Virginia Uniform Commercial Code (Va. Code Ann. 8.2-210) provides:

> *§ 2-210 Delegation of performance; assignment of rights. (1) A party may perform his duty through a delegate* ***unless otherwise agreed*** *or unless the other*

In going beyond mere reversal and actually directing that judgment on liability be entered against the Lightning as the moving party, the Court of Appeals has deprived Lightning of the day in court it would certainly have had but for the first adjudication by which the District Court made proof of materiality unnecessary.

(a) Fifth Amendment; Due Process.

Does not the Circuit Court's disposition of the case under the circumstances described at (1) hereinabove violate the movant's right to procedural due process under the Fifth Amendment to the United States Constitution ?

This Court has repeatedly held that the touchstone of procedural due process is notice and opportunity to be heard. It goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them. *Morgan* v. *United States*, 304 U.S. 1 (1938).

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*party has a **substantial interest in having his original promisor perform** or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.* [counsel's emphasis]

Section 318 of the Restatement, entitled "Delegation of Performance of Duty", in pertinent part provides:

*(1) An obligor can properly delegate the performance of his duty to another unless the delegation is contrary to public policy or **the terms of his promise.***

*(2) **Unless otherwise agreed**, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised.* [counsel's emphasis]

While courts have held that proceedings under Rule 56 satisfy the requirements of due process,[3] the vitality of those holdings necessarily depend upon the extent to which there is fair and reasonable notice and opportunity to be heard.

In *New York Life Ins. Co. v Brown* (1996, CA5 La) 84 F3d 137 for example, an attempt to serve a defendant with a copy of a summary judgment motion at an address that was not his last-known address was held to be so inconsistent with due process as to render the resulting summary judgment void because without notice of the impending grant of summary judgment defendant had no opportunity to be heard.

No less remedial measure should be accorded here inasmuch as by changing the law of the case from what was determined by the District Court, and relying on a record which was never intended to address the resulting change in the dispositive issue of fact, the Court of Appeals has committed no less egregious violation of due process than the district court in *New York Life*, *supra*.

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[3] See, e.g., *Hill v McDermott, Inc.* (1987, 5th Cir. La) 827 F2d 1040, 8 FR Serv 3d 926, cert den (1988) 484 US 1075, 98 L Ed 2d 1014, 108 S Ct 1052; and, *Avia Group International, Inc. v L.A. Gear California, Inc.* (1988, CA FC) 853 F2d 1557, 7 USPQ2d 1548.

(b) Seventh Amendment; Trial by Jury.

Does not the Circuit Court's disposition of the case under the circumstances described at (1) hereinabove violate the movant's right to trial by jury under the Seventh Amendment to the United States Constitution ?

The deprivation of due process in this case has a cascading effect in that it implicates as well the Seventh Amendment right to trial by jury.

There is no question that the ordinary contract dispute presented in this diversity case, where the parties have preserved their right to jury trial by demanding same in their pleadings, requires under the Seventh Amendment trial by jury as to any genuine issue of fact to be resolved.

While it has been long held, even prior to the adoption of Rule 56, that the Seventh Amendment is not offended by reasonable methods of determining what facts if any are actually in dispute and dispensing with jury trial where no genuine issue of fact requires resolution,[4] such holdings are as well dependent on the underlying due process requirements of notice and opportunity to be heard.

But beyond the failure of the Court of Appeals to recognize that directing judgment against it as the moving party would afford Lightning no fair opportunity to meet the new issue which it ruled was dispositive, there is another and independent reason why its disposition of the case runs afoul of

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[4] See *Ex Parte Peterson*, 253 US 300, 40 Sup Ct 543, 64 L Ed 919 (1920); and *Fidelity and Deposit Company of Maryland v. United States*, 187 US 315, 23 Sup Ct 120; 47 L Ed 194 (1902).

the Seventh Amendment. In the absence of waiver of the right to trial by jury, it is violation of Seventh Amendment for a federal court to substitute itself for the jury, pass upon the effect of evidence, find the facts involved in issue, and render judgment. *Baylis v Travellers' Ins. Co.* (1885) 113 US 316, 28 L Ed 989, 5 S Ct 494; Hodges v Easton (1882) 106 US 408, 16 Otto 408, 27 L Ed 169, 1 S Ct 307.

More importantly here, where fair-minded men might reach different conclusion on a dispositive question dependent on facts, such as negligence, the question should be left to jury. *Bailey v Central V. Ry.* (1943) 319 US 350, 87 L Ed 1444, 63 S Ct 1062.

In the present case there can be no question that the dispositive conclusion reached by the Court of Appeals – that the plaintiff's breach was not so material as to give rise to justifiable repudiation of the remainder of the contract by the Lightning – is an issue no less dependent on facts than the issue of negligence.

Section 2-210 of the Virginia Uniform Commercial Code (Va. Code Ann. 8.2-210) provides:

> *§ 2-210 Delegation of performance; assignment of rights. (1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a* ***substantial interest in having his original promisor perform*** *or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.* [counsel's emphasis]

Section 318 of the Restatement, entitled "Delegation of Performance of Duty", in pertinent part provides:

(1) ...

(2) Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a ***substantial interest in having that person perform*** *or control the acts promised.*
[counsel's emphasis]

In *TSC Industries, Inc. vs. Northway, Inc.*, 426 US 438, 96 S Ct 2126, 48 L Ed 2d 757 (1976), this Court observed that,

...the issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts. In considering whether summary judgment on the issue is appropriate, n11 we must bear in mind that the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality. The determination requires delicate assessments of the inferences a "reasonable [man]*" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact. n12*

n11 Federal Rule Civ. Proc. 56(c) permits summary judgment only when "there is no genuine issue as to any material fact."

n12 In an analogous context, the jury's unique competence in applying the "reasonable man" standard is thought ordinarily to preclude summary judgment

> *in negligence cases. See 10 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2729 (1973).*

Id, 426 US at 449.

A court should no more substitute its judgment for a jury in determining whether there exists materiality in fact than it should determine the ultimate question of liability in a negligence case. What interest a promisee may have in having his original contract partner perform the remainder of the contract may or may not be evident in the express contract language.[5] Assuming that the Court of Appeals is correct that the mere express prohibition of delegation in the contract was insufficient to demonstrate the required materiality of interest, it was incumbent on that Court to remand the entire case for the trier of fact. *TSC Industries, supra.*

Instead, the Court of Appeals ignored the possibility that a jury might very well determine that Lightning was justified by a legitimate concern that Amerada Hess, whose remaining "duties" under the contract were substantially more than mere payment, would not be as reliable a contract partner than the original party. Notwithstanding its Fortune 500 status, Amerada Hess is essentially an energy trading company whose business, unlike Statoil's, is more like that of Enron's. Amerada owns none of the infrastructure on which its continuing duty to maintain pipeline facilities of sufficient capacity to receive Lightning's gas depends. Moreover, precisely because of its size (as compared to Statoil), small producers such as Lightning are more likely to be squeezed

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[5] It is noted however that it Petitioner's position, sustained by the District Court, was that a substantial interest *is* sufficiently evidenced by the inclusion in the contract of an express prohibition against delegation and that the "...unless otherwise agreed..." language of the U.C.C. and the Restatement thereby exempt it from the necessity of further proofs.

out of pipeline capacity in deference to larger producers in its book of business. Nevertheless the Court of Appeals concluded that the only duty about which Lightning could be legitimately concerned was Amerada's duty to honor the credit extended to it by the Lightning which permitted it to pay for gas taken within a fixed period of time after delivery. (See Appx. A-8 & A-9).

As it is, Lightning never had the opportunity to address any of these factors. The matter was never litigated, nor even relevant to the litigation until the Court of Appeals said otherwise.

Accordingly, aside from whether the Lightning had a fair opportunity to be heard on the issue, the Court of Appeals should not have passed on the issue, it being one peculiarly reserved to the trier of fact. In doing so nevertheless, it violated the Seventh Amendment.

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QUESTION 2 - Diversity; Duty to Ascertain State Law

May a Circuit Court in diversity reverse summary judgment on the grounds of an undecided question of state law without engaging in appropriate analysis and prediction as to how the highest court of the state would decide the issue?

The pivotal principle of law on which the District Court relied in awarding summary judgment to Lightning was that proof of a breach by one party of an *express* prohibition of delegation of *duties*[6] is, without further showing of materiality,

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[6] In this case the "duties" of the breaching party included the duty to maintain pipeline facilities of sufficient capacity to receive the

sufficient to justify repudiation of the remaining portion of the contract by the other party.

While this appears to be the law in every state which has decided the issue (see *infra*), the Supreme Court of Virginia has never had occasion to decide the issue. Nevertheless, the Court of Appeals reversed the District Court without engaging in any analysis whatsoever as to how the Virginia high court might rule.

The principles of *Erie R. Co. v Tompkins*, 304 US 64, 82 L Ed 1188, 58 S Ct 817 (1938), more recently refined in *Salve Regina College vs. Sharon L. Russell*, 499 U.S. 225; 111 S. Ct. 1217; 113 L. Ed. 2d 190 (1991) require courts of appeals to determine applicable state law *de novo*. Where, as here, doing so would have demonstrated that Virginia law is unsettled, the courts are further admonished to make a reasonable prediction as to how the state's high court would rule, certify the issue to that high court, or, abstain and remand the case to the state courts. *Lehman Brothers vs. Schein*, 416 US 386; 94 S Ct 1741, 40 L Ed 2d 215 (1974).

The Court of Appeals in this case did none of these things. Nowhere in its opinion does it rely on any Virginia case deciding the pivotal issue as to whether a breach of an express contract term forbidding delegation of duties is itself proof of materiality sufficient to warrant discharge of the other party. It does advert to Virginia case law standing for the proposition that a breach must go to the root of the contract (*Neely vs. White*, 14 SE 2d 337 (Va. 1941)), but that general principle of Virginia law both begs and misses the dispositive question as to whether a breach of an *express* prohibition against delegation is sufficient.

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gas, the duty to take the gas and the duty to at honor the credit extended to it by the Lightning to pay for the gas so taken within a fixed period of time.

Moreover, the question is not simply one of Virginia common law. It is as well one of statutory construction embedded in Virginia's own Uniform Commercial Code. Section 2-210 of the Virginia Uniform Commercial Code (Va. Code Ann. 8.2-210) provides in pertinent part:

> *§ 2-210 Delegation of performance; assignment of rights. (1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract...* [counsel's emphasis]

In effectively determining that the Lightning must demonstrate materiality beyond the express prohibition of the contract, the Court of Appeals has, without analysis as to how the Virginia Supreme Court would decide the issue, construed what is clearly a disjunctive "or" as a conjunctive "and."

Additionally, this provision of the Virginia Uniform Commercial Code echoes the same distinction (between contracts which contain an express prohibition and those which are silent) which is made by the Restatement (Second) of Contracts.

Section 318 of the Restatement (Delegation of Performance of Duty), on which the District Court in part relied (Appx. A-16), in pertinent part provides:

> *(1) An obligor can properly delegate the performance of his duty to another unless the delegation is contrary to public policy* ***or the terms of his promise.***

> *(2) **Unless otherwise agreed**, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised.* [counsel's emphasis]

Notably, the language of subsection (2) of §318 (*...has a substantial interest in having that person perform or control the acts promised...)* is essentially identical to that contained in §2-210 of the Virginia Uniform Commercial Code, *supra* (...has a *substantial interest in having his original promisor perform or control the acts required by the contract...)*, making clear that proof of such a material interest is only required where the contract contains no express prohibition.

Furthermore, Section 322 of the Restatement (Contractual Prohibition of Assignment) on which the District Court also in part relied (Appx. A-31-32), even provides that where there is only a general prohibition of assignment (which does not expressly forbid delegation of *duties*), the delegation of *duties*, in contradistinction to the assignment of *rights*, is nevertheless barred. It is only where *rights* are assigned in violation of the prohibition that the assignment is saved from the bar and it is necessary to prove damages. It states in pertinent part:

> *(1) Unless the circumstances indicate the contrary, a contract term prohibiting assignment of "the contract" **bars only the delegation to an assignee of the performance by the assignor of a duty or condition.***
>
> *(2) A contract term prohibiting assignment of **rights** under the contract, unless a different intention is manifested, (a) does not forbid assignment of a right to damages for breach of*

> *the whole contract or a right arising out of the assignor's due performance of his entire obligation;* ***(b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective;*** *(c) is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor or the obligor from discharging his duty as if there were no such prohibition.*

[counsel's emphasis]

Notwithstanding that these and other sources, including a universal consensus among states which have decided the issue (see *infra*), from which the Court of Appeals might have confidently predicted the law of Virginia, it made no attempt to engage in any analysis with a view toward doing so. Its failure to do so or otherwise to certify the question for decision by that court[7] is so blatant a disregard of the principles of diversity established by this Court as to warrant intervention by certiorari.

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[7] Virginia Supreme Court Rule 5:42. (Certification Procedures) provides in pertinent part:

(a) Power to Answer. -- The Supreme Court may in its discretion answer questions of law certified to it by the Supreme Court of the United States, a United States court of appeals for any circuit, a United States district court, or the highest appellate court of any state or the District of Columbia. Such answer may be furnished, when requested by the certifying court, if a question of Virginia law is determinative in any proceeding pending before the certifying court and it appears there is no controlling precedent on point in the decisions of the Supreme Court or the Court of Appeals of Virginia.

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QUESTION 3 - Abuse of Judicial Power

While certiorari does not ordinarily issue to review an alleged error in the application of state law in a diversity case, and courts of appeal are effectively courts of last resort, should not certiorari nevertheless issue where an extraordinary departure by a Panel of the Court of Appeals from otherwise universally recognized principles of contract law, coupled with other significant factors, suggests an intentional disregard of the rule of law and thereby an egregious abuse of judicial power?

It is universally held in states which have decided the issue that an express prohibition against delegation of *duties* (in contradistinction to an assignment of *rights*) will be enforced so as to discharge the non assigning party. See generally 37 ALR 2d 1251 (Validity of Anti-Assignment Clause in Contract). The editors of this ALR annotation go so far as to limit the scope of the annotation to the effect of anti-assignment clauses on the assignment of rights rather than duties, saying,

> *Since obviously a contracting party may not, without the consent of the one with whom he deals, bind the latter by any purported assignment or transfer of the obligations of the contract (4 AM Jur 233, Assignments §5), it is clear that questions regarding the validity of anti-assignment provisions of contracts have to do with the assignment of rights only...*

Id. at §1.

While there is no case on point in Virginia, there is hardly a question anywhere else that duties and

obligations may not be delegated where expressly contracted otherwise. Not only does Section 2-210 of the Virginia Uniform Commercial Code, *supra*, suggest that this principle is already part of Virginia law, but Sections 318 and 322 of the Restatement, *supra*, (with which the Virginia Uniform Commercial Code's language agrees) demonstrate there to be little question in American jurisprudence that such an expressly bargained for prohibition goes to the root of the contract. The rule exists for the benefit of an obligor who for reasons of his own seeks to prevent the intrusion of third parties by inserting a provision which forbids assignment without his consent. Importantly, and contrary to the conclusion reached by the Court of Appeals, those reasons are not subject to question where the prohibition is expressly bargained for.

The hypothetical at Illustration 7 to Restatement §318 makes this eminently clear. It states:

> *A contracts with B that A will personally cut the grass on B's meadow. A cannot effectively delegate performance of the duty to C,* ***however competent C may be.*** [counsel's emphasis]

Yet the Court of Appeals chose to ignore this array of established precedent and impose its own brand of justice upon this dispute. Not only did it apply the wrong standard, but it buttressed its conclusion that Hess was entitled to judgment under it on the clearly erroneous assumption that Lightning's only possible remaining interest in the executory portion of the contract was concern over payment. Without considering the nature of the contract it said,

> *...the only performance now required by Hess Energy is the payment of invoices as submitted by Lightning* (Appx. A-8)... [t]*hus, Lightning's only justification for becoming concerned with Amerada*

> *Hess' making payments in lieu of Hess Energy's making them would have to be based on its dealing with a "shaky buyer"...* (Appx. A-9)

In doing so the Court of Appeals ignored the fact that Amerada Hess's remaining "duties" under the contract were substantially more than mere payment. Notwithstanding its Fortune 500 status, Amerada Hess is essentially an energy trading company whose business, unlike Statoil's, is more like that of Enron's in that it owns none of the physical infrastructure on which its continuing duty to maintain pipeline facilities of sufficient capacity to receive Lightning's gas depends. Moreover, precisely because of its size (as compared to Statoil), small producers such as Lightning are more likely to be squeezed out of pipeline capacity in deference to larger producers in its book of business. Nevertheless the Court of Appeals concluded that the only duty about which Lightning could be legitimately concerned was Amerada's duty to honor the credit extended to it by Lightning which permitted it to pay for gas taken within a fixed period of time after delivery. And, basing the dispositive conclusion of fact solely[8] on a matter which nowhere appears in the record (that Amerada Hess is a Fortune 500 Company – See Appx. A-8) it proceeded to conclude that Amerada Hess was entitled to judgment without giving Lightning an opportunity upon remand to prove its other concerns.

The result for a small company like Lightning is devastating in that Hess now computes its damages to approach $4 million.

While this Court is not often want to intercede in matters of state law based merely upon the interests of the litigants, Lightning believes that the error committed is so

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[8] The record is devoid of any proof of the financial condition of Amerada Hess.

egregious as to suggest that the Panel of the Fourth Circuit has engaged in an abuse of judicial power so fundamental as to warrant this Court's concern.

In this regard the recorded colloquy during argument will demonstrate that the members of the Panel appeared to dismiss arguments on the law on the basis of an overriding concern with the conceded fact that Lightning was, following its repudiation of the contract, able to sell its gas at a substantially higher price. More than once counsel argued the irrelevancy of that fact to the issues at hand, and more than once, the Panel made clear that it was "very troubled" by what it considered to be Lightning's opportunism in a rising market.

Certainly the right to repudiate a contract cannot rise or fall on whether there is an opportunity for economic advantage. It goes without saying that any party having right to repudiate a contract would nevertheless not do so lest *some* advantage would be gained.

The great distance the Court of Appeals has placed between itself and the unanimity of contract precedent to the contrary, and its studious disregard of the very substantial duties beyond mere payment that remained to be performed, suggest that beyond the commission of legal error, the Court of Appeals has intentionally overstepped the bounds of legitimate judicial prerogative by dispensing justice unfettered by the rule of law.

Admittedly, the evidence (consisting of exchanges in the colloquy coupled with a patent departure from applicable law) that such a break with fundamental principles of jurisprudence has in fact here occurred is thin. It is however the nature of the matter that such breakdowns in judicial discipline of the kind suggested here are subtle and difficult if not impossible to identify with impunity.

Nevertheless, it is precisely because of the insidious nature of the practice, and the significant harm which it forebodes beyond the present parties, that this case warrants this Court attention. Because, but for the rare call of certiorari, it is the courts of appeal which are the courts of last resort, where as here there is a palpable suspicion that a court has indulged in such a practice, this Court should grant certiorari.

Whether the Court does so for the explicit purpose of confronting the suggested issue of abuse of judicial power directly, or simply to correct the errors of law facially apparent in the Panel's decision thereby implicitly to check such practice, this case presents an ideal vehicle to suppress what is apparently here, and may otherwise more dangerously be a general predilection of the Fourth Circuit Court of Appeals to adjudicate cases unconstrained by the rule of law.

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Conclusion

For all the above reasons, this Court should grant the Petition for Certiorari.

Respectfully submitted,

By _____

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APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HESS ENERGY, INCORPORATED,

Plaintiff-Appellant,

v. No.01-1582

LIGHTNING OIL COMPANY, LIMITED,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (CA-00-1347-A)

Argued: December 3, 2001 Decided: January 18, 2002

Before WILKINSON, Chief Judge, NIEMEYER, Circuit Judge, and Joseph R. GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Chief Judge Wilkinson and Judge Goodwin joined.

COUNSEL

ARGUED: Daniel M. Joseph, AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P., Washington, D.C., for Appellant. Joseph E. Alto- mare, Titusville, Pennsylvania, for Appellee. **ON BRIEF:** Anthony T. Pierce, Michael L. Converse, Kelly M. Skoloda, AKIN, GUMP,

HESS ENERGY, INC. v. LIGHTNING OIL CO. STRAUSS, HAVER & FELD, L.L.P., Washington, D.C., for Appellant.

OPINION NIEMEYER, Circuit Judge:

Upon Hess Energy, Inc.'s complaint against Lightning Oil Company, Ltd., which demanded damages for breach of a

natural gas supply contract, the district court granted summary judgment to Lightning. The court found that Hess Energy, by assigning administrative responsibilities to its parent company, violated the supply contract's assignment-limitation provision, thereby justifying Lightning's nonperformance. We conclude that if an improper assignment of contract obligations occurred, it was not material and therefore did not justify Lightning's nonperformance. Accordingly, we reverse and remand for a determination of Hess Energy's damages.

Lightning and Statoil Energy Services, Inc. entered into a Master Natural Gas Purchase Agreement ("Master Agreement") on November 1, 1999, under which Lightning agreed to supply natural gas to Statoil. The amounts and prices for particular deliveries of natural gas were established by negotiated individual confirmation contracts entered into in accordance with the Master Agreement. The arrangement was to last one year, after which it was to continue from month to month until terminated by either party after 30-days' notice. But the Master Agreement could not be terminated "before the expiration of any existing Confirmation [contract]."

Between November 16, 1999, and March 7, 2000, Statoil made seven purchases under the Master Agreement, each of which was duly governed by a confirmation contract stating the terms of the particular transaction and signed by both parties. The confirmation contracts obligated Lightning to supply natural gas to Statoil in specified volumes and prices and over specified periods, the latest extending to March 31, 2002.

On February 22, 2000, Statoil's parent company consummated a stock purchase agreement with Amerada Hess Corporation to sell the stock of Statoil to Amerada Hess. Following this stock purchase, Statoil's corporate name was changed to Hess Energy, Inc., and Amerada Hess became involved in the administration of Hess Energy's

purchases of natural gas from Lightning under the Master Agreement.

For approximately three months, Lightning appeared to have no problem with Amerada Hess' involvement in the administration of the confirmation contracts between Lightning and Hess Energy. On May 11, 2000, Lightning submitted its April invoice for the natural gas delivered in April 2000 to "Amerada Hess" at the Pennsylvania address designated in the Master Agreement for correspondence with Statoil, and on May 24 Amerada Hess paid this invoice by wire transfer. Thereafter, on May 25,2000, Amerada Hess notified Lightning, consistent with Article XIV of the Master Agreement, that Hess Energy's correspondence address was changed to that of Amerada Hess' Alexandria, Virginia office. After receiving that notice, Lightning sent its invoices for the natural gas delivered in May and June 2000 to the Virginia address, and again Amerada Hess timely paid both invoices.

At Lightning's request, on May 31, 2000, Lightning met with Amerada Hess to discuss terms for future natural gas purchases. When the parties were unable to agree on prices, they openly considered the possibility of Lightning finding another customer for its natural gas. In response to this discussion, Amerada Hess faxed a letter to Lightning that same day in which it stated that Amerada Hess and Lightning "have mutually agreed to terminate the [Master Agreement] effective October 31, 2000" but that existing confirmation contracts would remain in effect. Lightning answered this fax by its own fax on June I, 2000, stating that there had been no agreement to terminate the Master Agreement and expressing the belief that there "was some misunderstanding" because there had merely been a "proposal" by Amerada Hess to terminate the contract.

A few days later, however- on June 7, 2000 -Lightning signed a contract with Natural Fuel Resources, Inc., an unrelated third party, to sell the natural gas that it had

previously committed to Hess Energy. And on June 23, 2000, Lightning and Natural Fuel Resources signed a Base Contract for Short Term Sale and Purchase of Natural Gas, covering the period July 2000 to March 2002. Lightning acknowledged that its purpose in signing this contract with Natural Fuel Resources was to obtain a better price than it had obtained from Hess Energy.

On July 26,2000 (one week after Amerada Hess paid Lightning's July 11 invoice for natural gas delivered in June), Hess Energy received a letter from Lightning (addressed to Statoil), stating that Lightning was terminating the Master Agreement, effective June 30, 2000, because Statoil (Hess Energy) had improperly assigned its con- tract obligations to Amerada Hess, its parent company, in violation of the Master Agreement. Although this letter was dated June 7, 2000, it was not postmarked until July 25.

Hess Energy then commenced this action against Lightning, seeking a declaratory judgment that it was not in breach of any contract with Lightning and demanding compensatory damages for Lightning's nonperformance in breach of the confirmation contracts. In its answer, Lightning stated that its termination of the Master Agreement and confirmation contracts was justified because Hess Energy had assigned some of its duties and obligations under the contract to Amerada Hess, in violation of Article XI of the Master Agreement. Article XI provides:

Neither Party shall assign this Agreement or any of its rights, duties or obligations hereunder unless it shall have first obtained the consent in writing of the other Party hereto, which shall not be unreasonably withheld or delayed, provided however that either Party may without the consent of the other Party, ...transfer or assign this Agreement to any successor, representative or assignee which shall succeed by purchase, merger or consolidation to the properties, substantially as an entirety, of Seller [Lightning] or Buyer [Statoil], as the case may be.

Lightning asserted that Hess Energy's breach of Article XI justified its discontinuing delivery of natural gas under the confirmation con tracts.

After discovery , Hess Energy filed a motion for summary judgment, arguing that Lightning had admitted the prima facie elements for Hess Energy's breach-of-contract claim and that Hess Energy had made no assignment forbidden by the Master Agreement. In the alter- native, Hess Energy argued that any alleged breach was not material. In a cross-motion for summary judgment, Lightning claimed that Amerada Hess' purchase of Statoil's stock and its subsequent administration of the Master Agreement evidenced an assignment in material breach of Article XI (the assignment-limitation provision) of the Master Agreement. The district court denied both motions, concluding that there was a dispute of material fact as to whether Hess Energy had assigned the Master Agreement to Amerada Hess.

Several months later, Lightning renewed its motion for summary judgment, claiming that the undisputed evidence showed that Hess Energy had assigned its responsibility under the Master Agreement to Amerada Hess. This time, the district court concluded that Hess Energy had assigned its responsibilities to Amerada Hess, in violation of Article XI of the Master Agreement, and granted summary judgment to Lightning. The district court pointed to the facts that Amerada Hess paid Hess Energy's invoices; that Amerada Hess had dealt with Lightning in the negotiation of confirmation contracts; and that Amerada Hess, not Hess Energy, had proposed the termination of the Master Agreement on May 31, 2000.

In a motion for reconsideration, Hess Energy argued that new evidence, produced for the first time when Lightning filed its cross-motion for summary judgment, demonstrated that Lightning had waived its right to object to Amerada Hess' involvement. This evidence showed that Lightning had been content to deal with Amerada Hess up until it found another

customer willing to pay a higher price for its natural gas. Hess Energy argued that Lightning had knowingly done business directly with Amerada Hess for many weeks before suddenly asserting that it objected to the "assignment." The district court rejected Hess Energy's arguments, mainly because they had not been presented earlier.

This appeal followed.

Although Article XI of the Master Agreement forbids either party from assigning "any of its rights, duties or obligations" under the Master Agreement without the other party's consent, there is no pro- vision in the agreement making such an assignment an automatic ground for immediate termination of either the Master Agreement or of the confirmation contracts under it. To the contrary, an assignment under certain circumstances is authorized, and any assignment could be made with Lightning's consent, which could not be unreasonably withheld. Accordingly, even if Lightning could establish that there was an improper assignment, termination would be justified only if the assignment resulted in a breach that was material. *See, e.g., Neely v. White,* 14 S.E.2d 337, 341 (Va. 1941) ("Before partial failure of performance of one party will excuse the other from performing his contract or give him a right of rescission, the act failed to be performed must go to the root of the contract").

Lightning contends that Hess Energy's alleged assignment "goes to the root of the contract" because it constitutes a breach of Hess Energy's promise "not [to] foist a stranger upon Lightning without its con- sent." Lightning suggests that *any* assignment is material "because it vitiates the very assent which is necessary to sustain a contract" and takes away Lightning's opportunity "to select and determine with whom [it] will contract." *See generally Arkansas Valley Smelting Co. v. Belden Mining Co.,* 127 U.S. 379 (1888).

But Lightning's basis for arguing that it can choose with whom to contract loses any support value when viewed in the context of this case. As both parties concede, the Marketing Agreement is no longer in force and no further confirmation contracts can be negotiated under it. All that remains are Hess Energy's damage claims for breach of the seven confirmation contracts. Indeed, several of these confirmation contracts were negotiated and signed, without objection, by a representative of Amerada Hess, who was also an officer of Statoil/Hess Energy. These contracts have been fully negotiated and executed by the parties, and the only performance now required by Hess Energy is the payment of invoices as submitted by Lightning. Amerada Hess has already paid several invoices submitted to Hess Energy without objection from Lightning, and Lightning has not suggested how the continuation of payment by Amerada Hess on behalf of Hess Energy is material to Hess Energy's performance of the confirmation contracts.

A test for materiality of the alleged breach at issue here is provided by the assignment-limitation clause itself. That clause prohibits only assignments made without Lightning's consent, which consent "shall not be unreasonably withheld." This contractual test of materiality therefore rests on the assignment's reasonableness. Because consent is required unless there is a legitimate reason to withhold consent, it follows that, where there is no legitimate reason to withhold consent, skipping the step of asking for consent does not constitute a material breach. And Lightning has offered no legitimate reason why it should not accept payment from Amerada Hess rather than Hess Energy. Indeed, Amerada Hess is a Fortune 500 company whose credit has not been challenged by Lightning. Nor has its credit been placed in doubt by its payment history in this case. Until the discussions in June about whether Hess Energy was paying Lightning the best price, Lightning was fully satisfied with Amerada Hess' payment conduct.

Even if Lightning had doubts regarding the prospect of receiving payment from Amerada Hess instead of from Hess Energy, terminating the confirmation contracts was not the appropriate remedy under the Uniform Commercial Code, which has been adopted in Virginia. The Code addresses the specific situation where a party's expectations are impaired, as Lightning would have to claim:

A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

Va. Code Ann. § 8.2-609(1). The official comment to this section notes further that "[a] seller needs protection not merely against having to deliver on credit to a shaky buyer, but also against having to procure and manufacture the goods, perhaps turning down other customers." *Id.* cmt. 1. Thus, Lightning's only justification for becoming concerned with Amerada Hess' making payments in lieu of Hess Energy's making them would have to be based on its dealing with a "shaky buyer," entitling Lightning to demand assurances and to suspend performance until those assurances were provided.

In sum, neither the terms of the Master Agreement nor of the Uniform Commercial Code create grounds for Lightning to terminate the confirmation contracts already negotiated and in force.

While our disposition of this case rests on the assumption, made for discussion purposes, that Lightning could establish that there was an improper assignment, it is not clear that this fact has been demonstrated. The mere transfer of ownership of Statoil stock to Amerada Hess did not constitute an

assignment in violation of Article XI. *See, e.g., Baxter Healthcare Corp. v. O.R. Concepts, Inc.*, 69 F.3d 785, 788 (7th Cir. 1995) (holding that a transfer of stock ownership does not change a corporation's contractual obligations). Because Statoil remained an independent company, the mere fact that its stock was acquired by Amerada Hess did not change Statoil's obligations under the Master Agreement and under the confirmation contracts. In addition, the fact that Statoil changed its name to Hess Energy had no bearing on its obligations to Lightning. Thus, we are left in search of other actions by Amerada Hess and Hess Energy that might have indicated an assignment.

There was no formal assignment of Hess Energy's rights, obligations or duties to Amerada Hess. Accordingly, the district court's ruling could only have been made by finding, as a matter of fact, that there was a constructive assignment. To this end, the district court noted that Amerada Hess had taken on many of Hess Energy's duties. Amerada Hess, for instance, had apparently paid invoices and had negotiated future contracts, including the possibility of terminating the Master Agreement. But these facts are ambiguous. The individual at Amerada Hess who was involved in these activities was also acting as an officer of Hess Energy. Moreover, the record fails to establish how Amerada Hess and Hess Energy accounted for payments and ser- vices between themselves. In addition, there is no evidence to contradict Hess Energy's position that it remained liable on the Master Agreement and confirmation contracts. Amerada Hess was merely assisting with contract administration. Indeed, with a closer look, the district court might well have been able to conclude that the facts necessary for a constructive assignment had not been presented. But the most it could conclude was that a factual question remained, precluding the entry of summary judgment.

Because we determine that any alleged assignment - considered in the context of the existing, agreed-to confirmation contracts - could not be a material breach of

those contracts, we reverse the judgment of the district court and remand for determination of Hess Energy's damages under the confirmation contracts.

REVERSED AND REMANDED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
FILED February 20, 2002
No. 01-1582
CA-00-1347-A
HESS ENERGY, INCORPORATED
Plaintiff -Appellant
v.
LIGHTNING OIL COMPANY, LIMITED
Defendant -Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

AS the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor CLERK

JUDGMENT
FILED: January 18, 2002

UNITED STATES COURT OF APPEALS for the Fourth Circuit

NO. 01 -1582

CA-00-1347-A

HESS ENERGY, INCORPORATED

Plaintiff -Appellant

v.

LIGHTNING OIL COMPANY, LIMITED

Defendant -Appellee

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria

In accordance with the written opinion of this Court filed this day, the Court reverses the judgment of the District Court. This case is remanded to the District Court for further proceedings consistent with the Court's opinion.

/s/ Patricia S. Connor CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT Of VIRGINIA

Alexandria Division

HESS ENERGY INC.,	)	
Plaintiff,	)	
v.	)	**C.A. No- 00-134-A**
LIGHTNING OIL CO., LTD.	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on Defendant's Second Motion £or Summary Judgment. The Motion is GRANTED.

I. Background

In early November 1999, Plaintiff, formerly known as Statoil Energy Services, Inc. ("Statoil "), and Defendant Lightning Oil Co. ("Lightning") entered into a natural gas supply contract ("the Agreement" or "the contract"). Lightning agreed to sell Statoil natural gas for prices that were to be determined in subsequent confirmations. Between November 16, 1999 and March 7, 2000, the parties signed a series of seven confirmations pursuant to the Master Agreement. The confirmations provided that Statoil would purchase specified quantities of gas from April 1, 2000 to March 31, 2002.

On March 31, 2000, Amerada Hess Corporation ("Amerada Hess") purchased 100% of Statoil's outstanding stock. On April 6, 2000, Statoil changed its name to Hess Energy, Inc., ("Hess Energy"), the Plaintiff. In June 2000, Lightning terminated the Agreement, claiming that Hess Energy had assigned the contract to Amerada Hess in violation of the anti-assignment clause. On August 8, 2000, Hess Energy filed this suit alleging breach of contract and

seeking damages. Cross-motions for summary judgment were submitted, and both were denied on December 13, 2000.

At the heart of the dispute was the interpretation of the-Agreement's assignment clause, which states:

> Neither party shall assign this Agreement or any of its rights, duties or obligations hereunder unless it shall have first obtained the consent in writing of the other Party hereto, which shall not be unreasonably withheld or delayed, provided, however, that either Party may without the consent of the other Party (and without relieving itself from liability hereunder), (i) assign or pledge this Agreement under the provisions or any mortgage, deed of trust, indenture or similar instrument which it has executed or may execute, or (ii) transfer or assign this Agreement to any successor, representative or assignee which shall succeed by purchase, merger or consolidation to the properties, substantially as an entirety, of Seller or Buyer, as the case may be.

The Court found that, as a matter of law, the second exception to the written consent requirement did not apply to Amerada Hess' purchase of 100% of-. Statoil's stock. Specifically, the Court ruled that under the exception's plain language, Amerada Hess had to purchase Statoil's physical properties, not merely its stock, to be excused from the consent requirement. Consequently, if Hess Energy had in fact assigned the Agreement or any of its rights, duties or obligations to Amerada Hess, it would be in breach, thereby relieving Lightning Oil of its executory contractual obligations. At that time, however, the record was inconclusive on the issue of assignment.

Discovery in the case ensued. Lightning has filed a second motion for summary judgment, claiming that, in light of certain deposition testimony, Hess Energy clearly assigned

certain of its contractual rights, duties or obligations to Amerada Hess. Hess Energy claims that summary judgment is inappropriate because the issue of assignment is still in dispute.

II. Standard of Review

Summary judgment is appropriate only if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) . See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Evans v. Technologies Applications & Service, Co., 80 F.3d 954 (4th Cir. 1996). In reviewing the record on summary judgment, "the court must draw any inferences in the light most favorable to the non-movant." Brock v- Entre Computer Ctrs., 933 F.2d 1252, 1259 (4th Cir. 1991).

The very existence of a scintilla of evidence or of unsubstantiated conclusory allegations is insufficient to avoid summary judgment. Anderson, 477 U.S. at 252. Rather, the court must determine whether the record a whole could lead a reasonable trier of fact to find for the non-movant. Id.

III. Analysis

Under the Restatement of Contracts (Second) § 318, an obligor may not properly delegate the performance of a contractual duty to another if the delegation is contrary the terms of his promise, as it is here. See Restatement of Contracts (Second) § 318, Comment a. Lightning claims that Hess Energy has delegated certain duties arising from the Agreement.[1] To support its claim, Lightning points to the following undisputed facts.

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[1] There is no evidence in the record that Hess Energy and Amerada Hess ever executed an assignment agreement.

Once Amerada Hess purchased Statoil, Amerada Hess, not Hess Energy, wired money from its account to Lightning in May, June, and July of 2000 for gas Lightning produced in April, May, and June 2000 for Hess Energy. Def's Sec. S.J. Mot. Exh. 1, Smith Decl.[2] Laurie Trettel, a former Statoil employee who began working for Amerada Hess after the stock purchase, sent a facsimile to all Statoil producers, directing them to look thereafter to Cindy Wernecke of Amerada Hess for payment. Id. Exh. 4, Laurie Trettel Dep. pp. 8-11. Wernecke is now responsible for paying the forwarded invoices from Statoil producers. Id. Exh. 5, Cindy Wernecke Dep. p. 10. Scott Perry and Dave Johnson, Amerada Hess employees formerly of Statoil, dealt with Lightning, when it wished to "trigger" and confirm prices under the Agreement.[3] See Id. Exh. 6 & 7. Finally,

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[2] After the stock purchase, Amerada Hess also made payments to A&S Production, Inc., ("A&S") another of Statoil's natural Oil gas producers. Id. Exh. 2, David Schrader Decl. ¶ 9. John Gartman, Amerada Hess Senior Vice President, informed A&S that had he had "taken over the existing Statoil Energy Services producer contracts that Amerada Hess Corporation acquired in the purchase of Statoil's energy marketing business." Id. While this evidence does not relate directly to Statoil-Lightning contract, it certainly suggests that Amerada Hess thought it had acquired Statoil's contracts along with its stock. Notwithstanding the Schrader declaration and Gartman letter to A&S, there is ample evidence that Amerada Hess was performing certain of Hess Energy's duties.

[3] When Lightning wanted to lock in their commodity price and commit to produce gas during a certain time period, it would phone either Perry or Johnson to set a target price or

Ben Hadden, who identified himself as Vice President of Amerada Hess, wrote Lightning Oil's President, Scott Enterline, a letter dated May 31, 2000, confirming the termination of a March 31, 1999 gas sales and purchase agreement between Lightning and Statoil. Id. Exh. 3, Ben Hadden Dep. pp. 8-9. Hadden represented that Amerada Hess would continue to purchase the volumes currently under contract through October 31, 2001.[4] Id.

Hess Energy's primary claim is that it never *intended* to assign any of its rights, duties, or obligations under the Agreement. Generally, in the absence of a legal assignment, courts look for an assignor's "intent" to determine if there was an "equitable assignment." See S.L. Nusbaum & Co. v. Atlantic Virginia Realty, Corp., 146 S.E.2d 205 (Va. 1966) (finding an assignment when the assignor appropriates a right to an assignor by an act, order or writing, with the intent to transfer a present interest). As Plaintiff correctly points out, there are no cases apply the "equitable assignment" doctrine

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sell at the current market price. This process .is known as "triggering prices." Perry Dep. p. 10.

[4] Hess Energy claims that Hadden, a former Statoil employee, was never a Vice President of Hess Energy. At the time of the letter, Hess Energy maintains that his title and position were uncertain and that he is now a Manager of Natural Gas Marketing in the Wholesale Energy Department. Hadden's title, however, is not dispositive, because Hess does not dispute the underlying fact that Amerada Hess, not Hess Energy, was terminating confirmation agreements and agreeing to purchase future volumes of gas.

when a party claims that duties were not delegated. See In re Purman's Estate, 358 Pa. 187, 56 A.2d 86 (1948); see also Restatement of Contracts (Second) § 324 ("The obligee must manifest an intention to transfer the right to another person without further action or manifestation of intention by the obligee."). The lack of cases, however, is not the least bit surprising because assignment and delegation are quite different. The assignment-delegation distinction is relatively straightforward:

> [R]ights are assigned; duties are delegated. When a party to a contract transfers his rights under the contract to a third party, he has made an assignment. If a party to the contract appoints a third party to render performance under the contract, he has made a delegation. Generally speaking, upon assignment of a right, the assignor's interest in that right is extinguished; however, upon the delegation of a contractual duty, the delegating party remains liable under the contract, unless the contract provides otherwise or there is a novation.

DuPont v. Yellow Cab Co. of Birmingham, Inc., 565 So.2d 190, 193 (Ala. 1990). Unlike the assignment of a right, the delegation of a duty does not involve a question of intent to transfer the contract or a right. Rather, delegation is evidenced by conduct. If a third party performed a contractual duty, the duty was delegated.

Here, Amerada Hess' conduct unambiguously shows a delegation of duties. The Trettel letter to Statoil producers clearly indicates that the duty to process and make payments on Statoil's contracts was being transferred permanently to Amerada Hess. Moreover, when Lightning wished to "trigger" prices under the Agreement, it would contact Amerada Hess employees Scot Perry or Dave Johnson, who performed the same duty as Statoil employees. Perhaps the

strongest evidence that a duty was delegated is the Hadden-Enterline correspondence. Hadden, formerly of Statoil, informed Enterline of Lightning that Amerada Hess would agree to terminate an already existing gas purchase confirmation between Hess Energy (Statoil) and Lightning. Id. Exh. 3, Ben Hadden Dep. pp. 9-11.

Notwithstanding those undisputed facts, Hess Energy claims that the actions taken by Amerada Hess employees and the payments wired from Amerada Hess' bank account were merely administrative services performed on its behalf. But, performance of certain duties by a third party on another's behalf is precisely what the contract prohibits.

Hess Energy also argues that Amerada Hess never assumed the legal obligation to pay for the gas or other performance obligations, and that it remained legally liable. See Plf's Opp. Exh. 2, Eisenhower Decl. ¶¶ 12, 15. Id. ¶ 12. The rules regarding delegation of duties, however, establish that it does not matter whether the person delegated -- Amerada Hess in this case --has a legal duty to render the performance in question or whether he acquires a legal right to render it. Restatement of Contracts (Second) § 318, Comment a. What does matter is that Hess Energy delegated certain duties to a third party.

IV. Conclusion

Because there is no genuine dispute as to a material fact, Defendant is entitled to judgment as matter of law. The Court will **GRANT** Defendant's Second Motion for Summary Judgment. An appropriate Order will issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT Of VIRGINIA

Alexandria Division

HESS ENERGY INC.,	)	
Plaintiff,	)	
v.	)	**C.A. No- 00-134-A**
LIGHTNING OIL CO., LTD.	)	
Defendant	)	

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby **ORDERED** that:

1) Defendant's Motion for Summary Judgment is **GRANTED**;

2) Plaintiff's Complaint is DISMISSED; and

3) the Clerk of the Court shall forward copies to all counsel of record.

February 6, 2001

Alexandria, Virginia

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT Of VIRGINIA

Alexandria Division

HESS ENERGY INC.,	)	
Plaintiff,	)	
v.	)	**C.A. No- 00-134-A**
LIGHTNING OIL CO., LTD.	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross Motion for Summary Judgment. After reviewing the record and hearing oral argument, the Court will **DENY** Plaintiff's Motion for Partial Summary Judgment and **DENY** Defendant's Cross-Motion.

I. Background

On August 8, 2000, Plaintiff, Hess Energy Inc. ("Hess Energy"), filed a complaint against Defendant, Lightning Oil Cc., Ltd. ("Lightning") , alleging breach of contract and seeking declaratory and injunctive relief. On August 25, 2000, the Court denied Plaintiff's request for a preliminary injunction. On September 25, 2000, Hess Energy filed this motion for partial summary judgment. Lightning filed an opposition and cross motion for summary judgment.

The following facts are undisputed. In early November 1999, Statoil Energy Services, Inc. ("Statoil") and Lightning entered into a natural gas supply contract ("the Master Agreement" or "the contract". Lightning agreed to sell Statoil natural gas for prices that were to be determined

in subsequent confirmations. Between November 16, 1999 and March 7, 2000, the parties signed a series of seven confirmations pursuant to the Master Agreement. The confirmations provided that Statoil would purchase specified quantities of gas from April 1, 2000 to March 31, 2002.

On March 31, 2000, Amerada Hess Corporation ("Amerada Hess") purchased 100% of Statoil's outstanding stock. On April 6, 2000, Statoil changed its name to Hess Energy, Inc. Laurie A. Trettel of Hess Energy sent a fax dated May 25, 2000 to "all producers," including Lightning, directing them to send all monthly production invoices for processing and payment to Cindy Wernecke of Amerada Hess in Alexandria, Virginia. Def's Mot. to Dismiss Exh. C. Ben Hadden, Vice President of Amerada Hess, sent a fax dated May 31, 2000 to Scott Enterline, president of Lightning, in which Hadden memorialized his understanding of a telephone conversation. The letter reveals that Hadden thought he and Enterline had agreed to terminate the Gas Sales and Purchase Agreement dated March 31, 1999 effective October 31, 2001. Def's Mot. to Dismiss Exh. D. In a June 1, 2000 letter, Scott Enterline responded to Haddens' May 31 fax. Enterline informed Hadden that he interpreted their telephone conversation as ending in a proposal from Amerada Hess, not an actual agreement to terminate the agreement. Enterline stated that he would need to get the Board's approval for the termination. Def's Mot. To Dismiss Exh. E.

In a June 7, 2000 letter, counsel for Lightning informed Statoil's Pittsburgh office that Lightning was terminating the Master Agreement effective June 30, 2000.[5] In the letter, Lightning claimed that it recently discovered

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[5] Hess Energy claims that it received the letter on July 26, 2000.

that Hess Energy had assigned the contract to Amerada Hess without Lightning's consent in violation of Article VI of the Agreement.[6] It viewed the violation as a substantial breach of the contract.[7] Article XI ("the assignment clause") of the Master Agreement reads:

> Neither party shall assign this Agreement or any of its rights, duties or obligations hereunder unless it shall have first obtained the consent in writing of the other Party hereto, which shall not be unreasonably withheld or delayed, provided, however, that either Party may without the consent of the other Party (and without relieving itself from liability hereunder), (i) assign or pledge this Agreement under the provisions or any mortgage, deed of trust, indenture or similar instrument which it has executed or may execute, or (ii) transfer or assign this Agreement to any successor, representative or assignee which shall succeed by purchase, merger or consolidation to the properties, substantially as an entirety, of Seller or Buyer, as the case may be.

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[6] Lightning's counsel inadvertently stated "Article IV" was violated. As Article VI addresses the quality and measurement requirements for gas, counsel clearly intended to say "Article XI."

[7] On August 2, 2000, Lightning directed the National Fuel Gas Supply Corporation, the natural gas distribution company responsible for delivering Lightning's gas to Hess Energy, to remove its meters from Hess Energy's production pool.

Hess Energy denies having ever assigned the contract to Amerada Hess. In the alternative, Hess Energy argues that even if it had assigned the contract, Lightning's consent was not required because Amerada Hess's purchase of all of Hess Energy's stock falls within the exception to the consent requirement. Further, Hess Energy claims that even if it did violate the assignment clause, Lightning was not permitted to repudiate the entire Agreement --its only remedy was to sue for damages. Plaintiff theorizes that Lighting breached the contract in order to sell the gas to other buyers at current, and markedly higher market prices, rather than sell to Hess Energy at the lower contract price.[8]

Lightning argues that there was an assignment; that the exception to consent does not apply to the assignment; and that the breach of the assignment clause excused it from its remaining obligations under the Agreement.

II. Standard of Review

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Evans v. Technologies

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[8] At the preliminary injunction hearing, counsel for Plaintiff stated that the price of natural gas is "skyrocketing." In response to a question about the amount of possible damages, counsel for Defendant informed the Court that if Hess Energy were to prevail, damages would be approximately $1,000,000. Of course, these statements have no bearing on the Court's disposition of the summary judgment motions or the actual measure of damages, if any. The do, however, reveal that both parties agree that the market price for natural gas was considerably higher than the contract prices.

Applications & Service, Co., 80 F. 3d 954 (4th Cir. 1996). In reviewing the record on summary judgment, "the court must draw any inferences in the light most favorable to the non-movant." Brock v. Entre Computer Ctrs., 933 F.2d 1252, 1259 (4th Cir. 1991).

The very existence of a scintilla of evidence or of unsubstantiated conclusory allegations is insufficient to avoid summary judgment. Anderson, 477 U.S. at 252. Rather, the court must determine whether the record a whole could lead a reasonable trier of fact to find for the non-movant. Id.; see Brock, 933 F.2d at 1259.

III. Analysis

The elements of breach of contract are: "(1) a legal obligation of a defendant to the plaintiff; (2) a violation or breach of that right or duty; and (3) a consequential injury or damage to the plaintiff" resulting from the breach. Brown v. Harms, 467 S.E.2d 805, 807 (Va. 1996) (quoting Westminster Invesing Corp. v. Lamps Unlimited, 379 S.E.2d 316, 317 (Va. 1989).[9] Lightning does not contest that there was a legal obligation; that it terminated the contract; and that the termination resulted in injury to Hess Energy. As such, the Court finds that Hess Energy has established a prima facie case for breach of contract. In its defense, Lightning claims that Hess Energy breached first, thereby justifying Lightning's repudiation of the contract.

At issue is whether Hess Energy assigned the contract and, if it did, whether the assignment violated the contract' assignment clause. Assuming an assignment violated the contract, the issue becomes whether the breach excused Lightning's repudiation of the entire Agreement.

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[9] Neither party has contested the use of Virginia contract law in this case.

A. Exception to Consent Requirement for Assignment

The Agreement provides that written consent to an assignment is not required if the contract was assigned "to any successor, representative or assignee which shall succeed by purchase, merger or consolidation to the properties, substantially as an entirety." Master Agreement, Article XI.

Hess Energy argues that Amerada Hess, by purchasing 100% of its outstanding stock, has "succeed[ed] by purchase, merger or consolidation to [Hess Energy's] properties, substantially as an entirety." Id. Lightning claims that the stock acquisition does not vest any ownership of Hess Energy's properties in Amerada Hess. Lightning argues that the two corporate entities are separate, and the legal ownership of their respective properties are separate as well.[10]

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[10] The cases Lightning cites in support of this proposition are not dispositive. They address whether the transfer of assets, including a contract, by a wholly-owned corporate entity to its parent/owner corporation is considered an assignment. See Lord Baltimore Filling Stations v. Hoffman, 117 A.2d 397, 398 (D.C. Ct. App. 1955) ("One corporation...assigned the lease to another corporation...and the fact that the one was the wholly owned subsidiary of the other did not prevent the transaction from being a true assignment."); Reston Recreation Center Associations v. Reston Property Investors Limited Partnership, 238 Va. 419, 384 S.E.2d 607 (1989). In those cases, the separate entity of the wholly-owned subsidiary was not disregarded for purposes of determining whether there was an assignment. The cases, however, do not address whether the purchase of all of Hess Energy's stock satisfies the exception to the assignment clause's consent requirement. The parties appear to be in agreement that the "properties" the contract contemplates constitute the physical infrastructure, by which the gas is transferred from the seller to buyer.

The issue before the Court, then, is whether the purchase of 1005 of a company's stock means Amerada Hess succeeded by purchase, merger or consolidation to Hess Energy's properties, substantially as an entirety. For the reasons stated below, the Court finds that it does not.

It is a well-established that "when a contract is clear and unambiguous, it is the duty of the court, and not the jury, to decide the meaning of the contract." D. C. McClain, Inc. v. Arlington County, 452 S.E. 2d 659, 662 (Va. 1995). Words that the parties used are normally given their usual, ordinary, and popular meaning. Id. In this case, the plain language of the contract requires an entity to succeed by purchase, merger or consolidation to the properties of the assigning party. Master Agreement, Article XI. Amerada Hess owns 100% of Hess Energy's stock and therefore has 100% control over it. It requires that the assignee "succeed by purchase...to the properties, substantially as an entirety." Id. A purchaser of stock in a corporation acquires an interest – not ownership – in the assets of the corporation. 18A Am. Jur. Corp. 749 (1985). Because of the "separate legal existence of a corporation, the corporate property is vested in the corporation itself and not in the stockholders." Id. (emphasis added). Accordingly, the properties of Hess Energy are vested in Hess Energy, the corporation, not in Amerada Hess, its sole shareholder. Even though Amerada Hess purchased all of Hess Energy's stock, it did not purchase the corporate assets, so it did not "succeed...to the properties."

Plaintiff argues that Amerada Hess's purchase of the stock satisfies the "purchase" language in the exception. This argument, however, would omit the term "properties." The key requirement in the exception is that Amerada Hess "succeed...to the properties, substantially as an entirety." Amerada Hess's stock purchase, without more, does not mean it succeeded to Hess Energy's properties.

Accordingly, if Hess Energy did indeed assign the contract to Amerada Hess, it needed to obtain Lightning's consent. Therefore, whether there was an assignment is material to the case.

B. Assignment

As an affirmative defense, Lightning claims that Hess Energy assigned some, if not all, of its rights, duties and obligations under the contract to Amerada Hess.

Lightning claims that while there may be not have been a legal assignment, there was a de facto assignment. In support of its argument, Lightning points to three correspondences between Amerada Hess and/or Hess Energy and Lightning that it alleges establish there was an assignment. First, there is the fax from Hess Energy directing all producers, including Lightning, to send all monthly production invoices for processing and payment to a new contact at Amerada Hess Corporation. Def's Mot. to Dismiss Exh. C. Lightning claims that the letter evidences that Hess Energy's administrative obligations had been assigned. To refute this contention, Plaintiff has submitted a declaration from a Hess Energy executive, Mark L. Eisenhower, stating that Hess Energy never assigned the contract to Amerada Hess. See Aug. 11, 2000 Decl. Mark L. Eisenhower ¶ 9.

Next, Lightning claims that Hess Energy attempted to obtain a ratification of the assignment from Lightning. To support this allegation, Lightning refers to two correspondences between Ben Hadden of Amerada Hess and Scott Enterline of Lightning Oil. After a telephone conversation between the two men on May 31, 2000, Hadden sent a facsimile to Enterline that reflected Hadden's understanding of their oral agreement to terminate a sales confirmation pursuant to the Master Agreement. Def's Mot. to Dismiss Exh. D. While the letter does not refer to a ratification or an assignment, Lightning argues that the letter

reflects a consciousness on the part of Amerada Hess that its exercise of Hess Energy's rights may be subject to question. Moreover, Mr. Hadden placed "Hess" in parenthesis after "Amerada Hess Corporation" which could possibly be construed as an attempt to make them synonymous, and in the text, he referred to Amerada Hess and Hess Energy interchangeably.

In a June 1, 2000 response letter; Enterline informed Hadden that he had interpreted their telephone conversation as ending in a *proposal*, not an actual agreement, to terminate the gas purchase agreement. Def's Mot. to Dismiss Exh. E. Lightning claims that this response letter reveals that Enterline rebuffed the attempt to obtain ratification.

Hess Energy disputes that the Hadden-Enterline correspondences reflect any desire by Amerada Hess to ratify an assignment. Plaintiff explains that the correspondences were the result of Lightning's attempt to sell additional supplies of gas to Hess Energy and to trigger prices and volumes for the period between November 1, 2001 and March 31, 2002. See Aug. 23, 2000 Decl. Mark L. Eisenhower at ¶¶ 8- 10.

Without further inquiry, the Court cannot determine whether there was an assignment. Therefore, based on the record currently before the Court, the Court finds that summary judgment is inappropriate because there is a genuine dispute of material fact as to whether Hess Energy assigned the contract, in whole or in part, to Amerada Hess.

C. Materiality of the Breach

Even if Hess Energy assigned the contract to Amerada Hess in violation of the anti-assignment clause, the Court must determine if the breach justified Lightning's repudiation of the entire contract.

Under Virginia common law, before a breach of contract excuses the non-breacher from performing his contract or gives him the right of rescission, the breach must go to the root of the contract, i.e., it must be "material." See Neely v. White, 177 Va. 358, 366 (1941). Parties, however, may abrogate common law principles by agreement, and the courts must enforce the clear terms of the agreement. See L&E Corp. v. Days Inn of America, Inc., 992 F.2d 55, 58 (4th Cir. 1993). In this case, the Master Agreement expressly prohibits the assignment of the "Agreement or any of its rights, duties and obligations." By the clear terms of the agreement, the parties negotiated that any such assignment was prohibited, and the Court must enforce the prohibition.

Even if the contract did not explicitly prohibit assignment of rights, duties and obligations but generally prohibited assignment of "the Agreement," an assignment would have excused Lightning's performance. Section 322 of the Restatement of Contracts (Second) addresses the consequences of assigning a contract that prohibits assignment of the "contract." Under the Restatement, where assignment is prohibited, section 322(1) states that the assignment of performance duties and obligations is barred. Section 322.2, however, provides that the assignment of rights will be valid unless the parties intended otherwise.[11]

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[11] The Restatement provides, in relevant part:
(1) Unless the circumstances indicate the contrary, a contract term prohibiting assignment of 'the contract' bars only the delegation to an assignee of the performance by the assignor of a duty or condition.
(2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested, ...(b)gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective.
Restatement 2d of Contracts 322 (1981).

Accordingly, only a material breach of an assignment clause that prohibits the assignment of rights will give the non-assigning party the right to repudiate the contract. Plaintiff argues that, under Section 322(2) (b), Lightning was not permitted to repudiate the contract but could only sue for damages.

The problem with Hess Energy's argument is that, under the Master Agreement, Hess Energy had both the right to purchase natural gas and the obligation to accept and transfer the gas. Therefore, an assignment of the "contract" meant rights, duties obligations were assigned so 322 (2) (b) is inapplicable. As such, section 322 (1) would bar the assignment .

Nevertheless, Hess Energy urges the Court to rely on Bel-Ray Co., Inc. v. Chemrite (PTY) LTD, 181 F.3d 435 (3d. Cir.1999). In Bel-Ray, the non-assigning party sought to enforce an arbitration agreement in the contract that had been assigned. The assignee contended that the assignment was ineffective because the non-assigning party had not consented to the assignment in writing as required by the contract. See id. at 440. The Third Circuit observed that under section 322 of the restatement, contractual provisions limiting or prohibiting assignment operate only to limit the parties' right to assign the contract, but not their power to do so, unless the parties manifest an intent to the contrary. See id. at 422.

Hess Energy claims that the Bel-Ray Court applied the principles in 322 (2) (b), namely that only a material breach excuses the other party's non-performance, to all assignments, including the assignment of obligations. Hess Energy argues that Chemrite, the assignee, had the right to market and sell Bel-Ray's products and the obligations to manufacture products for sale in South Africa and to pay Bel-Ray for the material used in production.

The Bel-Ray Court, however, never addressed the Restatement's distinction between the assignment of rights and the delegation of duties.[12] In fact, section 322 (2) (b) is the only part of Section 322 cited in the opinion. See id. at 441 – 42. Because Section 322(1) stands in stark contrast to 322(2) (b), the Court doubts that the Bel-Ray Court intended to apply the principles of 322(2)(b) to 322(1).[13] Other than Bel-Ray, Plaintiff cites no cases that have purportedly ignored the Restatement's distinction between contractual prohibition of delegation of duties and assignment of rights.

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[12] It is unclear whether Chemrite argued the distinction. Regardless, the Court omits any discussion of it entirely. Moreover, it is unclear whether Hess Energy's characterization of Chemrite's obligations and rights is correct, as the Court never engaged in it own characterization.

[13] All of the relevant cases cited in *Bel-Ray* refer to the assignment of rights. See Bel-Ray, 181 F.3d at 442. None even remotely address the consequences of breaching an assignment clause that bars the delegation duties. See e.g., Cedar Point Apartments v. Cedar Point, Inv. Corp., 693 F.2d 748, 754 & n.4 (8th *Cir.* 1982; (finding that even if the assignment clauses prohibited delegation of duties and the assignment of rights, the assignment of rights is not necessarily void, citing 322 (2) (c)) ; Pro Cardiaco Prontc Soccrro Cardioligica, S.A. vs. Trussel, 863 F.Supp. 135, 137 (S.D.N.Y. 1994)(discussing assignment of right to insurance proceeds); Lomas Mortgage *U.S.A.* v. W.E. O'Neil Construction Co., 812 F.Supp. 841, 843-44 (N.D.Ill. 1993) discussing assignment of right to sue for breach. of contract and citing only 322(2)(b)); and Macklowe vs. 42nd St. Dev. Corp., 170 A.D.2d 388, 389 (N.Y. 1991) (discussing assignment of rights to receive all profits and economic benefits).

As such, the Court reads Bel-Ray as affirming the general rule that an assignment of rights in violation of an assignment clause remains valid and renders a party liable for damages. The rule, however, is inapplicable to this case as the assignment entailed a delegation of duties.

Regardless, the interplay and difference between assignment of rights and assignment of duties is not particularly relevant to this case because the contract expressly prohibits assignment of rights, duties and obligations. Therefore, a breach of the assignment clause gave Lightning the right to repudiate the entire contract.

IV. Conclusion

In conclusion, the Court finds that Amerada Hess's purchase of Hess Energy's stock would not except Hess Energy from obtaining Lightning's consent to an assignment. Furthermore, a breach of the assignment clause would excuse Lightning from performing its executory obligations. Therefore, the existence of an assignment is central to the case. Because there is a genuine dispute of material fact as to whether there was an assignment, summary judgment is improper. Plaintiff's Motion for Partial Summary Judgment is **DENIED,** and Defendant's Cross Motion for Summary Judgment is **DENIED.** An appropriate Order will issue.

December 13, 2000
Alexandria, Virginia

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT Of VIRGINIA

Alexandria Division

HESS ENERGY INC.,	)	
Plaintiff,	)	
v.	)	**C.A. No- 00-134-A**
LIGHTNING OIL CO., LTD.	)	
Defendant.	)	

ORDER

In accordance with the accompanying Memorandum Opinion, is hereby **ORDERED** that:

1) Plaintiff's Motion for Partial Summary Judgment is **DENIED;**

2) Defendant's Cross-Motion for Summary Judgment is **DENIED;** and

3) the Clerk of the Court shall forward copies all counsel of record.

December 13, 2000

Alexandria, Virginia United States District Judge